

**AMENDED**  
**INTERIM REPORT NO. 6**  
**REGARDING THE SAN DIEGO CITY**  
**EMPLOYEES' RETIREMENT SYSTEM FUNDING SCHEME**

**REPORT OF THE**  
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year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year." *San Francisco Gas Co. v. Henery Brickwedel* 62 Cal. 641, 642 (1882).

As was pointed out by pension board members John Casey and Ann Parode, MP-1 created liabilities in years that exceeded those years' revenues. MP-1 pushed the unpaid liabilities into future years and onto the next generation.<sup>201</sup> Because the MP-1 contract was created in violation of the liability limits of San Diego Charter § 99, MP-1 is void. Again, under San Diego Charter § 99 each year's revenue must pay each year's indebtedness, and no indebtedness incurred in any one year may be paid out of the revenue of any future year. *Tehama County v. Sisson* 152 Cal. 167 (1907). In 1996 and 1997, the City was unable to incur the MP-1 liabilities because they had to be paid from the revenues of subsequent years. *Bradford v. City and County of San Francisco* 112 Cal. 537 (1896).

By requiring City officials to limit the City's liabilities to its same year revenues, San Diego Charter § 99 enshrines the pay-as-you-go mandate for financing City services:

The City shall not incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at election to be held for that purpose, have indicated their asset as then required by the Constitution of the State of California, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interests on such indebtedness as it falls due.

In 1968 the voters amended San Diego Charter § 99 to bring it into conformity with a similar provision in the California State Constitution (Article XVI § 18). Former City Attorney Ed Butler explained that the intent behind the amendment was "to bring our Charter into conformity with the protections afforded by the State Constitution."<sup>202</sup> Article XVI §18 of the California State Constitution requires a 2/3 vote of the electorate before liabilities exceeding revenue in the same year may be incurred:

No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters of the public entity voting at an election to be held for that purpose ...<sup>203</sup>

Under the debt limit language in San Diego Charter § 99 and California State Constitution Article XVI § 18, the San Diego City Council may incur liabilities that exceed same year revenues only after an election. The election mode becomes the measure of the City's power to incur any liability beyond the limit fixed by Charter § 99. *City of San Ta Cruz v. Wykes*, 202 F. 357 (1913).

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<sup>201</sup> See Minutes of 11 June 1996 SDCERS board workshop. N. 129; 21 June 1996 minutes of 21 June 1996 SDCERS board; 20 December 1996 SDCERS board, n. 189; 31 July 1996 memorandum from pension fund administrator Lawrence Grissom. N. 179.

<sup>202</sup> Argument For Proposition A Signed by San Diego City Attorney Ed Butler. Proposition A was adopted by the voters at the 1968 Primary Election.

<sup>203</sup> Article XVI § 18 (a) of the California State Constitution. See n. 1.

When a City's power to make a contract is statutorily limited to a certain prescribed method and a contract is created in violation of the prescribed method, the contract is void:

[T]he contract is void because the statute prescribes the only method in which a valid contract can be made, and the adoption of the prescribed mode is a jurisdictional prerequisite to the exercise of the power to contract at all and can be exercised in no other manner so as to incur any liability on the part of municipality. Where the statute prescribes the only mode by which the power to contract shall be exercised the mode is the measure of the power. A contract made otherwise than as so prescribed is not binding or obligatory as a contract and the doctrine of implied liability has no application in such cases. *Reams v. Cooley*, 171 Cal. 150, 154 (1915).

Because of San Diego Charter § 99, the City Council was without power to incur the pension liabilities caused by MP-1:

Here, neither the officers of the corporation nor the corporation, by any of the agencies through which they act, have any power to create the obligation to pay for the work, except in the mode which is expressly prescribed in the charter; and the law never implies an obligation to do that which it forbids the party to agree to do. *Reams v. Cooley*, 171 Cal. 150, 155 (1915) (quoting from *Brady v. Mayor etc. of New York*, 16 How. Pr. 432).

The San Diego City Charter operates not as a grant of power but rather as an instrument of limitation and restriction on the exercise of power over all municipal affairs that the City is assumed to possess. Any contract made without regard to the Charter's limitations and restrictions is void and unenforceable. *Domar Electric, Ind. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994); *Miller v. McKinnon*, 20 Cal. 2d 83, 88 (1942); *Reams v. Cooley*, 171 Cal. 150, 153-154 (1915); *Howard Jarvis Taxpayers Assn. v. City of Roseville*, 106 Cal. App. 4th 1178, 1186 (2003).

Because in adopting MP-1, the City Council incurred liabilities that exceeded revenues for that and later years, the City Council's action was *ultra vires* -- that is, beyond the scope or in excess of City Council's legal power or authority.<sup>204</sup> An *ultra vires* act is one "performed without any authority to act.... [An] *ultra vires* act of a municipality is one which is beyond powers conferred upon it by law." Black's Law Dictionary 1522 (6th ed.1990). The MP-1 contract created liabilities above same year revenues and was wholly beyond the powers of a municipality. MP-1 is therefore void. *Los Angeles Dredging Co. v. City of Long Beach*, 210 Cal. 348, 353 (1930); see also *Thomas v. City of Richmond*, 79 U.S. (12 Wall.) 349 (1870).

Because those contracting with a municipality are presumed to know the extent of its authority with regard to constitutional municipal debt limitation, all who act contrary to those limitations must bear the risk of a shortfall in the current year's revenues. *Law Offices of Cary S. Lapidus v. City of Waco*, 114 Cal. App. 4th 1361 (2004). All parties contracting with the City are required to ensure that liability contracts are made in compliance with the Charter:

It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the

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<sup>204</sup> Webster's Third International Dictionary.

officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglect this, or choose to take the hazard, he is a mere volunteer, and suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or ought to know it, before he places his money or services at hazard. *Reams v. Cooley*, 171 Cal. 150, 157 (1915).

Those claiming benefits under MP-1 are presumed to have known that MP-1 was created in violation of Charter § 99's liability limits, and therefore they have no means of obtaining payment. *Weaver v. City and County of San Francisco*, 111 Cal. 319 (1986). The MP-1 claimants' ignorance of the law is no excuse: "A party engaging in business relationships with a municipality is presumed to know the law including the procedures necessary to enter into a binding contract." See *Miller v. McKinnon*, 20 Cal. 80, 83 (1942); *Seymour v. State*, 156 Cal. App. 3d 200, 205 (1984).

The framers of the California State Constitution placed the liability limits into the State Constitution to avoid floating indebtedness:

The system previously prevailing in some of the municipalities of the State by which liabilities and indebtedness were incurred by them far in excess of their income and revenue for the year in which the same were contracted, thus creating a floating indebtedness which had to be paid out of the income and revenue of future years, and which, in turn, necessitated the carrying forward of other indebtedness, was a fruitful source of municipal extravagance. The evil consequences of that system had been felt by the people at home and witnessed elsewhere. It was to put a stop to all of that, that the constitutional provision in question was adopted. *San Francisco Gas Co., v. Brickwedel*, 62 Cal. 641, 642 (1882).

Obviously, enforcing the Charter's liability limit would work a major change in favor of disciplining the City's fiscal practices:

Payment not only goes hand in hand with expenditure, but wasteful expenditures, instead of being concealed or mitigated by delay of payment or the creation of debts, must be immediately made known to the people, through the demands of the tax-gatherer for money. This system is wholesome in this effect upon those who control and can squander the taxes. They are made sensible that their delinquencies will be known by being immediately felt by their constituents. It is wholesome in its effect upon the people. Their self interest is provoked to prompt scrutiny into conduct of their public agents. *State v. Medbery*, 7 Ohio St. 522, 541 (1857); *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 Wis. L. Rev. 1301, 1134.

A City can violate the constitutional municipal debt limitation by incurring even a very small debt if the City's other obligations during that year have already exhausted the City's total revenues for the year. *Law Offices of Cary S. Lapidus v. City of Wasco*, 114 Cal. App. 4th 1361 (2004). In San Diego the pension board and the City Council have created a massive liability and have passed that unpaid liability on to the next generation. Those who claim MP-1 as their defense may not be heard because they are required always to comply with the liability limit provisions of the Charter, and they

did not do so. MP-1 is void. Although this finding might be considered radical, it is what the law requires:

We have neither the right nor the disposition, by judicial interpretation, to take away the wholesome restriction upon municipalities thus imposed by the Constitution. Of course, in giving effect to this radical change from the pre-existing condition of things, it will not be strange if some shall be found to suffer. But it must be remembered that all are presumed to know the law, and that whoever deals with a municipality is bound to know the extent of its powers. Those who contract with it, or furnish supplies, do so with reference to the law, and must see that limit is not exceeded. With proper care on their part and on the part of the representatives of the municipality, there is no danger of loss. *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641, 643 (1882).

### CONCLUSION

The City of San Diego has suffered irreparable injury because elected and appointed officials failed to comply with the liability limit laws of the California Constitution Article XVI § 18 and the San Diego Charter § 99. The illegal liabilities that they created in the pension plan that many of them shared in must be set aside under these and other provisions of law previously identified in the City Attorney's other Interim Reports.

By \_\_\_\_\_  
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